

**Letter of Findings: 40-20140076**  
**Utility Receipts Tax**  
**For the Years 2005 through 2009**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUE**

**I. Utility Receipts Tax – Phone Cards and Prepaid Cell Phones.**

**Authority:** IC § 6-2.3-1-4; IC § 6-2.3-1-13; IC § 6-2.3-1-14; IC § 6-2.3-2-1; IC § 6-2.3-3-2; IC § 6-2.5-1-22.4; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it is not subject to Utility Receipts Tax on the money it earns from selling phone cards and prepaid cell phones.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state telecommunications company that sells prepaid cell phones and prepaid phone cards. Taxpayer sells its prepaid wireless phones and prepaid phone cards at major retail stores.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit found that Taxpayer began doing business in 2004 but did not file a Utility Receipts Tax return until 2010.

The audit resulted in the assessment of additional Utility Receipts Tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Utility Receipts Tax – Phone Cards and Prepaid Cell Phones.**

**DISCUSSION**

Taxpayer argues that money received from the sale of phone cards and prepaid cell phones is not subject to Utility Receipts Tax ("URT"). Taxpayer maintains it is not providing taxable "telecommunication services." In addition, Taxpayer argues that the prepaid phone cards and phones "do not limit the customers' access to exclusively telecommunications services." Taxpayer explains that its "customers have access to non-telecommunication services such as internet and other data services." Taxpayer concludes that "[s]ince the customers can access more than telecommunication services, the services sold to [Taxpayer's] customers do not fit within the prepaid calling service definition."

Taxpayer believes that the sale of its phone cards and phones should be treated as the sale of tangible personal property and not the sale of telecommunication services.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department determined that Taxpayer had failed to include receipts from connection and disconnection charges as gross receipts subject to the URT. Taxpayer disagrees arguing that it is not selling taxable telecommunication services.

The URT is imposed by IC § 6-2.3-2-1, as follows:

An income tax, known as the utility receipts tax, is imposed upon the receipt of:

- (1) the entire taxable gross receipts of a taxpayer that is a resident or a domiciliary of Indiana; and
- (2) the taxable **gross receipts** derived from activities or businesses or any other source within Indiana by a taxpayer that is not a resident or a domiciliary of Indiana. (**Emphasis added**).

"Gross receipts" for purposes of the Indiana's URT is defined at IC § 6-2.3-1-4 as follows:

"Gross receipts" refers to **anything of value, including cash or other tangible or intangible property** that a taxpayer receives in consideration for the retail sale of utility services for consumption before deducting any costs incurred in providing the utility services. (**Emphasis added**).

Nonetheless, Taxpayer maintains that the URT – effective in Indiana as of January 1, 2003 – does not apply to the sale of prepaid phones and prepaid phone cards because the definition of "telecommunication services" was not clarified until January 1, 2008, with the adoption of IC § 6-2.5-1-22.4 which provides:

"Prepaid wireless calling service" means a telecommunications service that:

- (1) provides the right to use mobile wireless service as well as other nontelecommunications services, including:
  - (A) the download of digital products delivered electronically; and
  - (B) content and ancillary services;
- (2) must be paid for in advance; and
- (3) is sold in predetermined units or dollars of which the number declines with use in a known amount.

Based on its interpretation of IC § 6-2.5-1-22.4, Taxpayer concludes that "[i]t is not clear from the statutes that prepaid calling services were treated as telecommunication services instead of tangible personal property until the adoption of the definition . . . beginning in 2008."

The Department must disagree with Taxpayer's contention because IC § 6-2.5-1-22.4 pertains to Indiana sales tax and not the URT.

The URT is imposed on the gross receipts a taxpayer receives from the sale of utility services. IC § 6-2.3-2-1.

"Gross receipts" includes the gross receipts a "taxpayer receives in consideration from the sale of utility services . . ." "Utility service" includes the furnishing of "[t]elecommunication services." IC § 6-2.3-1-14. In turn, "telecommunication services" – for purposes of the URT is defined at IC § 6-2.3-1-13, which provides:

"Telecommunication services" means the **transmission of messages or information** by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities. The term does not include any of the following:

- (1) Value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.
- (2) Value added services providing text, graphic, video, or audio program content for a purpose other than transmission.
- (3) The transmission of video programming or other programming:
  - (A) provided by; or
  - (B) generally considered comparable to programming provided by; a television broadcast station or a radio broadcast station, including cable TV, direct broadcast satellite (DBS/DISH), and digital television (DTV). (**Emphasis added**).

Therefore, since Taxpayer is in the business of selling prepaid phone cards and prepaid wireless phones, Taxpayer is in the business of selling telecommunication services consisting of the "transmission of messages or information." IC § 6-2.3-1-13.

Taxpayer raises an additional objection stating that its sale of services is not limited to ordinary phone service but that its customers may use the phones and phone cards for "texting" or for "accessing the Internet." However, it is not necessary to address the question of whether the price paid for "texting" or Internet service is subject to URT because Taxpayer cannot distinguish the amount of money it receives for providing ordinary phone service from the amount of money it receives for these services. IC § 6-2.3-3-2 specifically provides as follows:

Notwithstanding any other provisions of this article, receipts that would otherwise not be taxable under this

article are taxable gross receipts under this article to the extent that the amount of the nontaxable receipts are not separated from the taxable receipts on the records or returns of the taxpayer.

Since Taxpayer is unable to distinguish different aspects of its revenue stream, it is not necessary to address the question of whether "texting" and "Internet access" are subject to the URT.

### **FINDING**

Taxpayer's protest is respectfully denied.

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